Supreme Court of the United States

OCTOBER TERM, 1945

No. 518

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

CARTER & WEEKES STEVEDORING COMPANY,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York

BRIEF FOR PETITIONERS

January 23, 1946.

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Petitioners,

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CARTER & WEEKES STEVEDORING COMPANY,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York

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BRIEF FOR PETITIONERS

A writ of certiorari was granted by this Court on November 19, 1945, to review a final order of the Court of Appeals of the State of New York (R. 79-80) affirming a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 76), which nullified a determination of the petitioner-Comptroller assessing respondent for taxes upon its gross receipts under the New York City general business tax laws for the years 1937 to 1940 in the sum of $2,352.75, inclusive of interest and penalties (R. 10).

The Court of Appeals nullified the Comptroller's determination upon the sole ground that the application of the New York City general business tax to the respondent's stevedoring business constituted a violation of the Commerce Clause (Art 1, §8, cl. 3) of the Federal Constitution (R. 79).

Opinions Below

The Court of Appeals affirmed the determination of the Appellate Division without opinion. Its memorandum of affirmance is reported in 294 N. Y. 906 (1945).

The memorandum opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, before which the proceedings to review the Comptroller's determination were heard in the first instance (R. 1-2), pursuant to Article 78 of the New York Civil Practice Act, is reported in 269 App. Div. 685 (1945) and reads as follows (R. 77):

> "Determination of the Comptroller of the City of New York unanimously annulled, with $50 costs and disbursements to the petitioner, and the respondents directed to refund petitioner's deposit, with interest on the authority of Puget Sound Stevedoring Co. v. Tax Commission (302 U. S., 90)."

Jurisdiction

The jurisdiction of this Court arises under U. S. Code, Title 28, §344, subd. (b). The decision of the Court of Appeals was based solely upon the ground that the tax as applied to respondent violated the Commerce Clause (R. 79). The decision of the Court of Appeals was rendered on July 19, 1945 (R. 79). The petition in this Court was filed on October 17, 1945 (R. 84), within three months of the decision of the Court of Appeals.

The petition was granted on November 19, 1945 (R. 84), concurrently with the granting of the petition filed by petitioners in *McGoldrick et al.* v. *John T. Clark & Son*, No. 519, which involves exactly the same question and will be argued at the same time as this case.

Statement of the Case

1. Facts

The respondent is a corporation engaged in the business of general stevedoring which consists of loading and unloading ships' cargoes moving in interstate and foreign commerce (R. 26-30, 33). Its sole office is in the City of New York (R. 37-38), and all its activities are performed solely and exclusively within the territorial limits of the City (R. 38-39, 53, 64). None of those activities, nor any part of them, is carried on outside the territorial limits of the City (R. 64). All of the respondent's contracts for its services are made in New York City (R. 30-31, 38-41, 68-72). All of its property is situated in the City (R. 51). The respondent is paid by its steamship company customers only for its stevedoring services. Only these receipts from its own activities in the City have been taxed (R. 30-31, 68-72).

2. The Tax Statutes Here Involved

The statutes, the constitutionality of which is involved, are the New York City general business and financial tax laws for the years 1937 to 1940, Local Laws No. 22 of 1937, No. 20 of 1938, No. 103 of 1939 and No. 78 of 1940 (constituting Article 12 of Title E, and Title O and Title R of Chapter 41 of the Administrative Code of the City of New York). The provisions of Local Law No. 78 of 1940 (Title R of Chapter 41 of the Administrative Code) which, so far as the issues herein are concerned, are substantially the same as the provisions of the other local laws involved,

are set out in full as Appendix A in the Appendix of Statutes to be submitted herewith.

All these local laws were enacted pursuant to authority conferred upon the City of New York by Laws of New York of 1934, Chapter 873, as annually amended in each of the years 1937 to 1940, inclusive (L. 1937, ch. 327; L. 1938, ch. 444; L. 1939, ch. 659; L. 1940, ch. 245). The provisions of the State enabling act pursuant to which Local Law No. 78 of 1940 was enacted (L. 1940, ch. 245) are set out in full as Appendix B in the Appendix of Statutes. The other enabling acts differ somewhat from the 1940 enabling act. These differences, however, did not and do not in any way affect the questions raised or presented in this case.*

3. Provisions of Statutes Involved

The New York City general business tax is imposed upon all persons "carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity" (Title R, ch. 41 of the Administrative Code, §R41-2.0 [Appendix A]). During the period involved it was imposed at the rate of 1/10% on all receipts "received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity" (§R41-2.0). Receipts are defined as "the gross receipts received in or by reason of any sale made or services rendered or commercial or business transaction had in the city" (§R41-1.0, par. 3). The City general business tax law has a provision (§R41-2.0, par. b) authorizing the Comptroller, in situations where a receipt cannot validly be taxed in its entirety by reason of the provisions of the Constitution of the United States or otherwise, to provide for allocation of such receipt "to the end that only that part of

* The provisions of the 1940 enabling act are substantially the same as those of the 1939 act, but differ somewhat from those of the 1937 and 1938 acts. The changes from the 1937 and 1938 acts were made necessary by a new provision of the New York State Constitution (Article XVI, Section 1), effective January 1, 1939. These changes do not affect the issues in this case.

such receipt which is properly attributable and allocable to the doing of business in the City shall be taxed hereunder". This allocation provision is in every local law here involved except the 1937 law (L. L. 22 of 1937). Since all respondent's business is done within the City of New York, all its receipts are attributable to such local business without recourse to this allocation provision. The respondent, therefore, is not affected by this provision.

1. History of the Tax Involved

The first New York City general business tax was imposed by Local Law No. 9 of 1934, enacted pursuant to authority conferred by Laws of New York of 1934, ch. 302. Local laws imposing these taxes have been and continue to be renewed and extended annually up to the present time, pursuant to subsequent State enabling acts authorizing them.

The first such enabling act was passed in 1933 (L. 1933, ch. 815). No general business tax was imposed by the City under this first enabling act. Prior to these enabling acts, the City's taxing authority was limited to taxes on real estate. The enabling acts extended the City's taxing authority, permitting it to impose other types of taxes in order "to relieve the people from the hardships and suffering caused by unemployment" (see, *e.g.*, L. 1940, ch. 245 [Appendix, p. 18]). The City's need for additional tax revenue from sources other than real property is reflected in the following excerpt from the report, dated March 13, 1945, of the Commission on Municipal Revenues and Reduction of Real Estate taxes (created by L. 1944, ch. 382),* at page 15:

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*The problem of relieving real estate of the burden of taxation in New York State has been the subject of legislative and other official study for many years. The Commission referred to is the last of many which considered the problem. During the period from 1916 to 1938 twenty-one commissions were appointed to devise a more equitable revenue system for the State and its subdivisions. Since 1938 several other commissions have inquired into one or more phases of the subject. See Report, Commission on Municipal Revenue and Reduction of Real Estate Taxes, March 13, 1945, p. 11.

> "With declining assessed valuations and sharply curtailed income from shared taxes, the municipalities found themselves confronted with the necessity of raising the moneys required not only to meet their normal costs of government but also to pay the debt service upon the huge borrowings accumulated in the twenties and to provide vastly increased relief and welfare services to their citizens. Real estate tax delinquencies pyramided rapidly."

And further, at page 20:

> "Experience in the depression years demonstrates that the gap between mounting costs and declining revenues cannot, and should not, be bridged by imposing upon real estate an additional burden of debt and taxation."

The general business tax here involved is one of a series of taxes which the City of New York enacted pursuant to the enabling legislation. These taxes include, amongst others, the New York City sales tax which was reviewed and upheld by this Court in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), and the New York City utility tax which was reviewed and upheld by this Court in *New York Rapid Transit Co.* v. *City of New York*, 303 U. S. 573 (1938).

All of these taxes have been continued up to the present time by reenactment under periodic extensions of the enabling acts. In 1942 the restriction, which until then limited the use of the revenues from these taxes for relief purposes only, was lifted. Since that time the City has been permitted to treat the revenues as part of its general funds, thus making possible the reduction of the real estate tax load borne by local real property owners.

Specification of Errors

Petitioners contend that the Court of Appeals erred:

(a) In failing to hold that the New York City gener. business tax was validly imposed upon respondent's

receipts, under the recent decisions of this Court in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938) and later cases.

(b) In following the decision of this Court in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), and accepting the holding in that case rather than the principles enunciated in *Western Live Stock* v. *Bureau of Revenue, supra*, and subsequent cases, as controlling on the question of the validity under the Commerce Clause of the City general business tax as applied to the respondent.

(c) In holding that the City general business tax as applied to respondent's receipts from its stevedoring activities constituted an unconstitutional burden on interstate commerce.

(d) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division and to annul the Comptroller's determination of general business tax liability against the respondent based upon its receipts from its stevedoring activities carried on wholly within the territorial limits of the City.

The Issue

The question presented is whether the New York City general business tax imposed upon the respondent's gross receipts from its stevedoring activities carried on wholly within the territorial limits of the City of New York is invalid under the Commerce Clause.

Respondent contends that the holding of *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937),* is decisive

* In the *Puget Sound* case the State tax there involved was held valid as to certain activities of the taxpayer regarded by the Court as not in interstate commerce. The tax was held invalid as to the taxpayer's stevedoring activities which were held to be interstate commerce (See 302 U. S., at 94). It is only the latter holding which is pertinent to the instant case. Where the *Puget Sound* holding or decision, etc., is referred to in this brief, it is the latter holding only that is intended.

of this case and that under that holding the tax here involved is invalid.

Petitioners contend that the case at bar is controlled by holdings of this Court in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and subsequent cases including, *inter alia*, *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938), *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939), and *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), and that under these cases the tax is valid. Petitioners contend also that the *Puget Sound* case has been rejected as authority and in effect overruled.

Summary of Argument

The New York City general business tax, which applies generally and without discrimination to all business activities carried on within the City, is properly imposed upon the respondent's gross receipts from its stevedoring activities carried on solely and exclusively within the City. The tax is not barred by the Commerce Clause because it does not regulate interstate commerce. The tax does not discriminate against interstate commerce, is commensurate only with wholly local activity, and does not subject that commerce to the possibility of multiple tax burdens. The tax merely exacts from interstate commerce the same fair contribution toward the support of local government as is exacted from intrastate business.

This case is controlled by the principles of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938) and subsequent cases, and not by the decision in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937). The *Western Live Stock* and later cases comply with the basic principles laid down by this Court for determining the validity of State taxes under the Commerce Clause, whereas the *Puget Sound* case fails to comply with those basic principles. Moreover, the *Puget Sound* case has in effect been rejected and overruled by this Court.

We shall develop the argument under the following points:

POINT I

The basic principles for determining the validity of State or local taxes under the Commerce Clause require that the right of the States to effectuate their fiscal policies be reconciled with the authority of the Federal Government to regulate interstate and foreign commerce, and that a State or local tax be invalidated only if in fact and in practical operation it regulates that commerce by discriminating against it or subjecting it to possible multiple tax burdens.

a. The States are free to carry out their tax programs without undue constitutional restrictions, and this Court will reconcile, wherever possible, State and federal interests.

b. State action or taxes are invalid under the Commerce Clause only if they regulate interstate or foreign commerce, *i.e.*, if that commerce is interfered with, discriminated against or subjected to possible multiple burdens.

c. Whether a State tax constitutes a regulation of interstate commerce depends upon the facts in each case.

POINT II

The holdings of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and subsequent cases, comply with the basic principles for determining the validity of State taxes under the Commerce Clause, whereas *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), does not. The *Western Live Stock* and later cases, therefore, should be regarded as determinative of the validity of the tax at bar.

a. The holdings of the *Western Live Stock* and subsequent cases.

b. The holding of the *Puget Sound* case.

c. The *Puget Sound* holding is not in accord with the basic principles and has, in effect, been rejected and overruled, particularly in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939).

POINT III

The tax at bar is valid under the Commerce Clause. It is non-discriminatory, commensurate with and reflective only of purely local activity, and is not susceptible of being duplicated in any other jurisdiction.

a. The tax is non-discriminatory.

b. The tax is commensurate with the respondent's local activity.

c. The tax raises no possibility of an undue or multiple burden on interstate commerce.

POINT IV

The invalidation of this tax will result in discrimination against intrastate commerce and will impede the carrying out of the State and City fiscal program.

POINT I

The basic principles for determining the validity of State or local taxes under the Commerce Clause require that the right of the States to effectuate their fiscal policies be reconciled with the authority of the Federal Government to regulate interstate and foreign commerce, and that a State or local tax be invalidated only if in fact and in practical operation it regulates that commerce by discriminating against it or subjecting it to possible multiple tax burdens.

The question presented in this case is, as indicated, whether a State tax, such as that here involved, imposed upon gross receipts from wholly local activity in interstate commerce, is invalid under the Commerce Clause. *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), held in effect that such gross receipts from interstate commerce were absolutely immune from State taxation. On the other hand, *Western Live Stock* v. *Bureau of Revenue*, 303 U. S.

250 (1938), and later cases hold in effect that States may tax such gross receipts from interstate commerce if the tax does not constitute a regulation of that commerce.

The *Puget Sound* holding is irreconcilable with that of the *Western Live Stock* and later cases. It is thus necessary to decide which properly states the law applicable to the determination of the question presented in this case. It is submitted that that holding is to be regarded as applicable which conforms to the basic principles which this Court has laid down for determining the validity of State or local taxes under the Commerce Clause.

We, therefore, proceed to an examination of these basic principles (POINT I). Thereafter (in POINT II), we shall examine the holding in the *Puget Sound* case and the holdings in the *Western Live Stock* and later cases in the light of these basic principles, and show that the holdings in the *Western Live Stock* and the later cases conform to those basic principles while the *Puget Sound* holding does not.

a. The States are free to carry out their tax programs without undue constitutional restrictions, and this Court will reconcile, wherever possible, State and federal interests.

The New York City general business tax is part of a fiscal program designed to relieve the tax burden borne by real property within the City by imposing other taxes which spread the burden more widely among persons and businesses generally within the City. (See pp. 5-6, *ante*.) Such a change or adjustment in tax policy is wholly within the discretion and judgment of the State itself. It is only the practical effect of the tax which determines whether it intrudes upon federal constitutional prerogatives. *General Trading Co.* v. *Tax Commission*, 322 U. S. 335, 338 (1944); *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209-210 (1944); *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 363 (1941); *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444-445 (1940); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 48 (1940).

In *Wisconsin* v. *J. C. Penney Co.*, *supra*, this Court said (311 U. S., at p. 444):

> "For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

And at page 445:

> "At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize."

Furthermore, where State action touches a federal sphere of action, the courts will attempt to harmonize the rights and interests of the State and Federal Governments and so far as possible accommodate one to the other without sacrificing either.

> "In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes

for the support of state government shall not be unduly curtailed."

McGoldrick v. *Berwind-White Coal Mining Co.*, *supra*, at 48.

See also:

United States v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 548 (1944).
Union Brokerage Co. v. *Jensen*, *supra*; at 207-208.

b. State action or taxes are invalid under the Commerce Clause only if they regulate interstate or foreign commerce, *i.e.*, if that commerce is interfered with, discriminated against or subjected to possible multiple burdens.

The Commerce Clause does not expressly or directly restrict the inherent taxing power of the States. A State tax offends the Commerce Clause only if it can be regarded as impinging on the power of Congress to "regulate commerce with foreign nations, and among the several states . . . ." *Gibbons* v. *Ogden*, 9 Wheat. 1, 199-200 (1824); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 45 (1940).

The fact that State action affects interstate commerce or increases the cost of doing business is not sufficient to invalidate it as a regulation of that commerce. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944), at 209; *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra*, at 48; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254 (1938); *Baldwin* v. *Seelig*, 294 U. S. 511, 525 (1935); *Galveston, H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217, 225, 227 (1908). Only State action which tends to obstruct or impede interstate commerce, or which discriminates against it or subjects it to disadvantages or burdens not borne by intrastate commerce constitutes regulation of interstate commerce which is barred by the Commerce Clause. The question to be determined was stated thus by this Court in *Union Brokerage Co.* v. *Jensen*, *supra*, at p. 209:

"Does the Minnesota legislation do that which the Commerce Clause was designed to prevent—does it express hostility toward those engaged in foreign commerce or practically obstruct its conduct?"

The fact that the State action takes the form of a tax impost does not alter this basic rule.

> "And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or *taxed* by the states." (Italics supplied.)
>
> *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), at 548.

See also:

Best & Co., Inc., v. *Maxwell*, 311 U. S. 454, 455-456 (1940).

It is recognized that interstate commerce is required to pay a fair share of the cost of government of the localities where its business is carried on. *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335, 338 (1944); *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra*, at 46; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 178 (1939); *Western Live Stock* v. *Bureau of Revenue*, *supra*, at 254; *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937).

c. Whether a State tax constitutes a regulation of interstate commerce depends upon the facts in each case.

Whether a State tax consitutes a regulation of interstate commerce is a practical question to be determined upon the facts in each case. *United States* v. *South-Eastern Underwriters Assn.*, *supra*, at 548; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359 (1941), at 366; *Hump Hair Pin Co.* v. *Emmerson*, 258 U. S. 290, 295 (1922).

Thus, in *Nelson* v. *Sears, Roebuck & Co., supra,* this Court said (at p. 366):

> "Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce."

Hence, to hold a State tax invalid under the Commerce Clause it must be established on the facts that, first, the tax affects interstate or foreign commerce; and, second, the tax constitutes a regulation of that commerce.

These, in summary, are the basic principles laid down by this Court by which the holding in the *Puget Sound* case and the holdings in the *Western Live Stock* and later cases must be tested to determine which is to be applied to the case at bar.

POINT II

The holdings of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and subsequent cases comply with the basic principles for determining the validity of State taxes under the Commerce Clause, whereas *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), does not. The *Western Live Stock* and later cases, therefore, should be regarded as determinative of the validity of the tax at bar.

a. The holdings of the *Western Live Stock* and subsequent cases.

In *Western Live Stock* v. *Bureau of Revenue, supra,* this Court upheld as valid under the Commerce Clause a State tax on gross receipts from an interstate business. Pointing out that some local taxes measured by gross receipts from interstate commerce have been declared un-

constitutional, the Court indicated the cause of their invalidity as follows (pp. 255-256):

> "The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (*citing cases*) or added to (*citing cases*) with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."

Thereafter, in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939), which also presented the question of the validity of a tax on gross receipts from interstate commerce, this Court held that the applicable principles for decision were those of *Western Live Stock* v. *Bureau of Revenue, supra*, and the cases following it, saying (305 U. S. at 438):

> "The constitutional effect of a tax upon gross receipts derived from participation in interstate commerce and measured by the amount or extent of the commerce itself has been so recently and fully considered by this Court that it is unnecessary now to elaborate the applicable principles. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307; cf. *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604."

This Court then proceeded to summarize these principles thus (pp. 438-439):

> "It has often been recognized that 'even interstate business must pay its way' by bearing its share of local tax burdens (*citation*), and that in consequence not every local tax laid upon gross receipts derived from participation in interstate commerce is forbidden. See *Western Live Stock* v. *Bureau of Revenue, supra*, 254 *et seq.*, and cases cited. But it is enough for present purposes that under the commerce clause, * * * state taxation, whatever its form, is precluded if it discrimi-

> nates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state (*citing cases*) burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject."

The same question was again considered by this Court and these principles reiterated and reaffirmed in subsequent cases, notably in *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938); *Gwin, White & Prince, Inc.* v. *Henneford, supra*, and *McGoldrick* v. *Berwind-White Coal Mining Co*, 309 U. S. 33 (1940). In each of those cases the decisions prior to *Western Live Stock* involving State taxes generally on interstate commerce were re-examined and revalued, and the principles of the *Western Live Stock* and subsequent cases were promulgated on the basis of that re-examination and revaluation. In these cases the Court synthesized and placed into a logical pattern the maze of seemingly conflicting decisions made over the years in cases involving the validity of State and local gross receipts taxes under the Commerce Clause. These cases have, therefore, come to be regarded as landmarks in the field of State taxes under the Commerce Clause. See LOCKHART, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40 (1943); POWELL, *New Light on Gross Receipts Taxes*, 53 Harv. L. Rev. 909 (1940); LOCKHART, *State Tax Barriers to Interstate Trade*, 53 Harv. L. Rev. 1253 (1940).

The principles laid down in those cases, summarized in the above quotation from *Gwin, White & Prince, Inc.* v. *Henneford, supra*, have been uniformly applied as determinative by this Court in all cases subsequent to *Western Live Stock* in which the question of validity of State taxes—

whether on gross receipts or not—under the Commerce Clause was presented. Where, when tested by these principles, the facts indicated the State tax discriminated against interstate commerce, or was not upon or commensurate with local activity, or presented the possibility of multiple burdens upon interstate commerce, the tax was held invalid. *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938); *Gwin, White & Prince, Inc.* v. *Henneford*, *supra*; *Best & Co., Inc.* v. *Maxwell*, 311 U. S. 454 (1940); *McLeod* v. *Dilworth Co.*, 322 U. S. 327 (1944). Where, however, the application of these principles to the facts indicated no discrimination, no tax on extraterritorial activity but only upon local activity, and no possibility of multiple burdens, the tax was held valid. *Coverdale* v. *Pipeline Co.*, 303 U. S. 604 (1938); *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1939); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940); *Dept. of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941); *Dept. of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252 (1941); *Allied Mills, Inc.* v. *Dept. of Treasury*, 318 U. S. 740 (1943), aff'd *per curiam* 220 Ind. 340 (1942); *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340 (1944); *General Trading Co.* v. *Tax Commission*, 322 U. S. 335 (1944).

The holdings of these cases conform to the basic principles for determining the validity of State taxes under the Commerce Clause as outlined in POINT I:

There is recognition that interstate business must pay its way locally and that the mere fact that interstate commerce is involved or affected by a State tax is not alone sufficient to invalidate. In each case, moreover, the facts were examined to determine whether the tax actually constituted a regulation of interstate commerce.

The States' fiscal requirements were accommodated to the interest of the Federal Government in preserving the free flow of interstate commerce. There were invalidated only taxes which in practical operation discriminated

against such commerce (*Best & Co., Inc.* v. *Maxwell, supra*), or were upon extra-state incidents or activity (*McLeod* v. *Dilworth Co., supra*), or subjected the commerce to possibility of multiple burdens (*Adams Mfg. Co.* v. *Storen, supra*, and *Gwin, White & Prince, Inc.* v. *Henneford, supra*). Moreover, in the two cases last cited the Court's realization of the need for reconciling State and federal interests is manifested by its recognition of the theory of allocation or apportionment as applicable to gross receipts taxes, as a means available to States of obtaining tax revenue from interstate commerce while avoiding the possibility of multiple burdens on that commerce.

Where, on the facts, the tax was found not susceptible of regulatory effect the tax was sustained (see cases cited p. 18, *ante*).

b. The holding in the *Puget Sound* case.

Puget Sound Co. v. *Tax Commission*, 302 U. S. 90 (1937), held invalid under the Commerce Clause a State gross receipts tax upon wholly local stevedoring activities. The holding of that case was, in effect, that persons engaged in a wholly local business in or connected with interstate commerce may not be subjected to a State tax on the gross receipts from that business. Thus (302 U. S., at 94):

> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. * * * The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states."

In reaching this conclusion there was considered only one of the two questions required to be determined to hold a State tax invalid under the Commerce Clause. As we have seen, the two questions are: (1) Is interstate or foreign commerce involved? (2) Does the tax have the

effect of regulating that commerce? In the *Puget Sound* case, only the first question was gone into, the Court holding that stevedoring activities were in interstate commerce. The second question, however, does not appear to have been taken up. The case is disposed of by the flat statement that a State cannot tax gross receipts from interstate commerce.

Thus, the New York State courts had to decide in this case whether the *Puget Sound* case or the later ones relied upon by petitioners were to be regarded as controlling the case at bar. The New York State courts regarded the *Puget Sound* case as the controlling authority. The Appellate Division in its opinion expressly said so (R. 77). While the Court of Appeals rendered no opinion, the inference is inescapable that it was of the same view.

However, in two earlier cases the Court of Appeals had actually upheld the validity under the Commerce Clause of local taxes on interstate commerce. *O'Kane* v. *State of New York*, 283 N. Y. 439 (1940); *Matter of Olive Coat Co.* v. *McGoldrick*, 287 N. Y. 769 (1942). The latter case involved the same New York City general business tax law as is here involved.

In deciding these cases the Court of Appeals necessarily adopted and applied the principles of law expressed in the *Western Live Stock, Adams Mfg. Co., Gwin, White & Prince* and *Berwind-White* cases. The failure of the Court of Appeals to do so in the case at bar can only be ascribed to the fact that, confronted with the *Puget Sound* case, with facts seemingly identical with those of the case at bar, the State court was reluctant to disregard that holding on a federal constitutional question in the absence of an express overruling of that case by this Court. This reluctance is understandable. However, if the *Western Live Stock* and later cases are valid and grounded upon the basic principles of law applicable and the *Puget Sound* case is not, the former must be applied to the case at bar and the *Puget Sound* holding upon which the New York courts relied must be rejected.

c. The *Puget Sound* holding is not in accord with the basic principles and has, in effect, been rejected and overruled, particularly in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939).

We have seen that the *Western Live Stock* and later cases do comply with the basic principles applicable to the case at bar (pp. 18-19, *ante*). However, the *Puget Sound* case fails utterly to meet the test of those basic principles. No attempt was made in the *Puget Sound* case to determine the practical effect of the tax. While the fact that the *Puget Sound* case involved local stevedoring activities may explain why the New York State courts considered that case controlling in the case at bar, that fact simply established that the tax as imposed *affected* interstate commerce. However, it had no bearing upon the question whether the tax had the effect of *regulating* interstate commerce. That is a question of fact depending upon the nature and practical effect of the tax—whether it actually discriminated against interstate commerce or created the possibility of undue or multiple burden. Certainly it could not have been regarded as being upon extra-state activity or not commensurate with local activity since the taxpayer there conducted business only within the taxing State (302 U. S. at 91). That case was determined not on the facts, but by application of an abstract rule that gross receipts from interstate commerce are immune from State taxation.

No attempt was made to harmonize or accommodate the State and Federal interests in the matter. No thought was given to the requirement that interstate business must pay its way locally.

It is clear, therefore, that the *Puget Sound* holding fails to conform to the basic general principles governing the determination of the validity of a State tax under the Commerce Clause. Furthermore, it is contrary to the law governing the validity of State gross receipts taxes under the Commerce Clause as uniformly and consistently laid

down and applied by this Court in all later cases from *Western Live Stock* v. *Bureau of Revenue* up to date. This alone is in effect an overruling of the *Puget Sound* case.

Its questionable status as authority is further indicated by the fact that it has never been cited as controlling by this Court in any subsequent case in which the same question was involved, *i.e.*, the validity of a State gross receipts tax on wholly local activity in interstate commerce.

Moreover, the decision of this Court in *Gwin, White & Prince, Inc.* v. *Henneford, supra,* is in effect a rejection and overruling of the *Puget Sound* case. This is clear from the following facts:

1. Both cases involved the same State gross receipts tax (Washington Laws, 1935, ch. 180).

2. In both cases it was determined that the tax was upon interstate commerce. Thus:

> "The business of appellant, in so far as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce."
>
> *Puget Sound* case, *supra,* at p. 92.

> "For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that [interstate or foreign] commerce. Such services are within the protection of the commerce clause * * *."
>
> *Gwin, White & Prince* case, *supra,* at p. 437.

3. In the *Puget Sound* case the result of invalidity was predicated solely upon the fact that interstate commerce was involved—without more. No inquiry was made to determine whether the tax in fact burdened or regulated interstate commerce in any way. Thus (302 U. S. at 94):

> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at

liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. • • • The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states."

4. If this were the applicable law it was sufficient to dispose of the *Gwin, White & Prince* case. Justices BUTLER and MCREYNOLDS in their concurring opinion in that case took the view that it was and relied upon and cited the *Puget Sound* case. Yet the majority opinion in the *Gwin, White & Prince* case did not even mention the *Puget Sound* case.

5. The conclusion of the majority of the Court in the *Gwin, White & Prince* case that the tax was invalid was not predicated, as was the decision in the *Puget Sound* case, on the single fact that interstate commerce was involved. The majority's conclusion was based rather upon an examination of the facts in the case which indicated that the tax as there imposed had the effect of regulating the commerce. The following are the facts leading the Court to this conclusion:

"While appellant is engaged in business within the state, • • • the interstate commerce service which it renders and for which the taxed compensation is paid *is not wholly performed within the state. A substantial part of it is outside the state* • • •." (Italics supplied.)

Gwin, White & Prince, Inc. v. *Henneford, supra,* at p. 438.

"Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, *is not apportioned to its activities within the state.* If Washington is free to exact such a tax, *other states to which the commerce extends may, with equal right, lay a tax similarly measured* • • •. *The present tax* • • • *thus in its practical operation discriminates*

> *against interstate commerce,* since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed." (Italics supplied.)
>
> *Ibid,* at p. 439.

This, it is submitted, is as direct a rejection and overruling of the *Puget Sound* holding as is possible, short of express statement.

Manifestly, therefore, the case at bar is controlled by the cases upon which petitioners rely. Applying the principles of those cases to the tax here involved, it is unquestionably valid.

POINT III

The tax at bar is valid under the Commerce Clause. It is non-discriminatory, commensurate with and reflective only of purely local activity, and is not susceptible of being duplicated in any other jurisdiction.

The principles for determining the validity of State gross receipts taxes under the Commerce Clause as they appear from the *Western Live Stock* and subsequent cases referred to may be summarized as follows: (1) persons doing business in, or connected with interstate or foreign commerce, are not immune from all taxes on their gross receipts; (2) such taxes are invalid under the Commerce Clause only if they discriminate against interstate commerce or result in the possibility of cumulative multiple tax burdens merely because interstate business is being done; (3) the possibility of cumulative multiple tax burdens is avoided as to such taxes by basing the tax either on the receipts from the particular activity locally carried on or, if the activity extends beyond State lines, upon a portion of the over-all gross receipts determined by formula to be commensurate with the activity locally carried on.

The application of these principles to the facts of the case at bar proves the tax to be valid under the Commerce Clause.

Petitioners are not here questioning that the respondent's business of stevedoring is part of interstate commerce and subject to federal regulation. However, petitioners do deny that the tax here involved is in any sense a regulation of interstate or foreign commerce or in any way interferes with or infringes upon the authority of Congress to regulate that commerce. The tax is not discriminatory; it is properly commensurate with the activity carried on locally, and there is no possibility of cumulative multiple tax burdens.

a. The tax is non-discriminatory.

The tax is a general business tax. It applies without discrimination to all persons carrying on business within the City. The same rate of tax is imposed upon all persons and the same tax base—gross receipts—is used for all persons. The tax does not apply only to persons engaged in interstate and foreign commerce, nor does it apply to such persons at a higher rate or in any respect more onerously than to persons engaged in purely local business. The lack of discriminatory intent and the scrupulous regard for the right of persons engaged in interstate and foreign commerce is manifested by the special provision requiring that where taxation of a receipt in its entirety is barred by the Constitution, a proper apportionment shall be made. There can be no question, therefore, that there is no discrimination either as against persons engaged in foreign and interstate commerce generally or against this respondent in particular.

b. The tax is commensurate with the respondent's local activity.

The receipts in question arise out of the respondent's wholly local business activity. No part thereof is earned

or contributed to by any activity outside the City. Hence, no allocation or apportionment is required to avoid the possibility of undue burden or multiple taxation, for it is clear that these receipts properly reflect the activity, and only the activity, carried on within the City of New York. A tax, therefore, based upon these receipts is obviously commensurate with the respondent's activity within the City of New York and cannot in any way be ascribed to, or regarded as being reflective of, any extra-city activity. The fact that this activity is in interstate commerce or that the receipts arise out of participation in interstate commerce does not, as we have seen, bar the tax, for "even interstate business must pay its way". *Western Live Stock* v. *Bureau of Revenue, supra*, p. 254; *Gwin, White & Prince, Inc.* v. *Henneford, supra*, p. 438.

c. The tax raises no possibility of an undue or multiple burden on interstate commerce.

The tax here involved does not impose any affirmative impediment to the conduct of interstate business. The carrying on of such business is not conditioned upon the payment of the tax. No licensing requirement is imposed by the law. Failure to pay the tax does not bar a person from carrying on his business or from engaging in business activity within the City.

In the case at bar there is no possibility of cumulative or multiple taxation. The respondent is engaged in business only in the City of New York. It has no place of business elsewhere. It has no property elsewhere. The services from which the receipts subjected to tax arise are performed wholly within the territorial limits of the City. It is, therefore, impossible for the tax here involved to be a burden "of such a nature as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it

would bear cumulative burdens not imposed on local commerce." *Western Live Stock* v. *Bureau of Revenue, supra*, pp. 255-256.

On these facts it is clear that this tax does not constitute a regulation of interstate or foreign commerce, nor does it intrude upon the federal power to regulate that commerce. Therefore it does not offend the Commerce Clause and must be sustained.

POINT IV

The invalidation of this tax will result in discrimination against intrastate commerce and will impede the carrying out of the State and City fiscal program.

(1)

The exclusion of interstate business from bearing a share of the local tax burden on a par with intrastate business has the effect of discriminating against and adding to the burdens borne by local business not in interstate commerce. The Commerce Clause affords no basis for such a result. Such exemption of interstate business is required only if necessary to effectuate the purpose of the Commerce Clause to safeguard interstate commerce from burdens not borne by intrastate commerce.

> "We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. • • • To deny Indiana this power would be to make local industry suffer a competitive disadvantage."
>
> *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340 (1944) at 349.

The *Western Live Stock* formula makes it possible for a State to place a fair share of the local tax burden upon persons engaged in interstate commerce within its borders without interfering with or regulating that commerce. Interstate business within a given State or community enjoys the police protection, fire protection, sanitation service, road maintenance and every other type of service afforded by the local governments equally with intrastate business. The City of New York also affords services which are of special and more immediate benefit to persons such as this respondent. As an example, the City maintains special marine fire and police fleets for protection of business on the City waterfronts.* There is no reason why in devising local tax programs the States and communities should not be able to count upon tax contributions from all persons within the community who share those benefits and services, including those engaged in interstate commerce.

(2)

This general business tax, as has been pointed out, is part of a program designed to relieve the heavy tax burden of real estate owners of the City. A tax upon property within the City, even if owned by persons in interstate commerce, would, of course, be valid. Can it be said that because of the Commerce Clause, the City of

* Seventy-fifth Annual Report, Fire Department of the City of New York (1940), pp. 19, 38, 101; Rules and Regulations, Police Department of the City of New York, pp. 24-25. For eighteen days in October, 1945, the police and protective services of the City, its labor conciliation service, the municipal radio broadcasting facilities, among others, were used extensively in an effort to settle a longshoremen's strike in the City and to safeguard the interests of the stevedores in the City, police protection to the City generally being seriously impaired by the assignment of extra police to this strike duty. The New York Times, Oct. 3, 1945, p. 15, col. 2; Oct. 6, 1945, p. 3, col. 2; Oct. 12, 1945, p. 1, col. 1; Oct. 13, 1945, p. 1, col. 8; Oct. 15, 1945, p. 1, col. 8; Oct. 16, 1945, p. 1, col. 8; Oct. 17, 1945, p. 1, col. 8; Oct. 18, 1945, p. 1, col. 8.

New York is barred from revising its tax scheme so as to shift part of the tax burden from real property which reaches only a limited number of persons, to a gross receipts tax base which obviously makes it possible to spread the burden more widely? Certainly, where the tax is imposed, as in the instant case, without discrimination against interstate commerce in form or in substance, and where the tax reflects and is commensurate only with purely local activity, there can be no question that the Commerce Clause is not offended.

Since the States and localities are entitled to contributions from all persons within their jurisdictions toward the support of the cost of the State and local governments, it should make no difference whether the form used for obtaining this contribution is a property tax or a gross receipts tax or any other form of tax, so long as interstate commerce is not discriminated against or unduly burdened.

Had the City of New York chosen, and been able to increase its real estate taxes, the gross receipts tax might possibly have been obviated. If this respondent were a real property owner its tax burden and accordingly its cost of doing business would then have been increased. Such an increase could not be regarded as a forbidden burden because the respondent was engaged in interstate commerce. There is no reason why the burden of a gross receipts tax conforming to the *Western Live Stock* formula, as does the one at bar, should be regarded differently.

CONCLUSION

We believe that we have demonstrated that the tax here involved does not in any respect constitute a regulation of interstate or foreign commerce. It is non-discriminatory, applying equally to intrastate as well as interstate commerce. It is reflective of local activity only and cannot possibly be duplicated in form or substance in any other jurisdiction. The tax is therefore valid. We believe we have demonstrated further that the holding in the *Puget Sound* case is contrary to the basic principles laid down by this Court for determining the validity of State taxes under the Commerce Clause. The New York State courts, therefore, erred in considering that case controlling.

The final order and judgment should be reversed and the petitioner-Comptroller's determination reinstated.

New York, N. Y., January 23, 1946.

Respectfully submitted,

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